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No. 09-1100

In the Supreme Court of the United States

CONNIE E. YANT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that petitioners did not establish a prima facie case of wage discrimination under the Equal Pay Act where petitioners provided no evidence that disparities in the wages of nurse practitioners and physician assistants were based on sex.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3-22) is reported at 588 F.3d. 1369. The opinion of the Court of Federal Claims (Pet. App. 23-43) is reported at 85 Fed. Cl. 264.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1-2) was entered on December 14, 2009. The petition for a writ of certiorari was filed on March 15, 2010 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Equal Pay Act of 1963, 29 U.S.C. 206(d), protects employees of private or public employers, including the federal government, 29 U.S.C. 203(d), (e)(1) and (2)(A), from wage discrimination "on the basis of sex."

29 U.S.C. 206(d)(1). The Act generally makes it unlawful for an employer to "discriminate * * * between employees on the basis of sex by paying wages to employees [within an] establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work" if the relevant jobs "require[] equal skill, effort, and responsibility" and are "performed under similar working conditions." *Ibid.* The Act excepts from that general prohibition all payments "made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex." *Ibid.*

This Court has explained that a plaintiff's prima facie case of wage discrimination under the Equal Pay Act requires a "show[ing] that an employer pays different wages to employees of opposite sexes 'for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.'" *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 195 (1974) (*Corning*) (quoting 29 U.S.C. 206(d)(1)). If a plaintiff carries that burden, "the burden shifts to the employer to show that the differential is justified under one of the Act's four exceptions." *Id.* at 196.

2. a. The Tennessee Valley Healthcare System (TVHS) is a component of the Department of Veterans Affairs (VA) within the VA's Veterans Health Administration (VHA). The TVHS employs substantial numbers of men and women both as "nurse practitioners" (a category of registered nurses) and as "physician assistants." Pet. App. 6-7. Congress has regulated the amount of pay for the VHA's registered nurses and physician assis-

tants since 1946 and 1975, respectively. See Act of Jan. 3, 1946, ch. 658, §§ 5(d), 7(a), 59 Stat. 676-677; see Veterans' Administration Physician and Dentist Pay Comparability Act of 1975, Pub. L. No. 94-123, § 5(d)(2), 89 Stat. 675.

Before 1990, Congress specified that the VA's registered nurses be paid under an eight-grade federal pay system set by Executive order. 38 U.S.C. 4107(b)(1) (1988); cf. 38 U.S.C. 4104(1) (1988) (nursing appointments). The VA Nurse Schedule, like the federal General Schedule, provided ten steps for each pay grade and, at each step within a grade, the resulting salary increased in equal increments. See, *e.g.*, Exec. Order No. 12,698, § 1(c) & Sched. 3-A, 54 Fed. Reg. 53,473, 53,479 (1989). Congress also specifically directed that (before 1990) the VA's "[p]hysician assistants" shall be paid under the "Nurse Schedule grade title and related pay ranges." 38 U.S.C. 4107(f) (1988). Accordingly, until 1990, the VA's registered nurses and physician assistants could have been paid at the same rate of pay under the single nationwide pay schedule required by statute.

On August 15, 1990, Congress altered the statutory pay provisions for registered nurses, including nurse practitioners. The Department of Veterans Affairs Nurse Pay Act of 1990, Pub. L. No. 101-366, 104 Stat. 430, established a new four-grade pay system for registered nurses, established the range of salaries for the steps within each grade, and created a locality pay system to "increase or decrease the rates of basic pay" for nurses based on healthcare wage data for each locality. §§ 101(a) and (c), 102(b), 104 Stat. 430-434 (38 U.S.C. 4107(b), 4141(b), (c)(1), (d)(2), (3) and (e)); see *Allison* v. *United States*, 39 Fed. Cl. 471, 473 (1997) (discussing nurse locality pay system). Congress has repeatedly re-

vised the statutory pay system for registered nurses since 1990 by, *inter alia*, expanding the system to five pay grades and requiring mandatory adjustments to the pay schedule to match any percentage increases in the General Schedule rate of pay. See 38 U.S.C. 7404(b), 7451(b), (d)(1)(A) and (e)(1).

Although Congress substantially altered the VA's statutory pay system for registered nurses in 1990 by creating a new pay system, it did not extend that change to the VA's physician assistants. Congress instead directed that "[p]hysician assistants * * * shall continue to be paid * * * according to the Nurse Schedule in [38 U.S.C.] section 4107(b) * * * as in effect on August 14, 1990," *i.e.*, one day before Congress enacted the VA Nurse Pay Act of 1990. Department of Veterans Affairs Health-Care Personnel Act of 1991, Pub. L. No. 102-40, § 301(a), 105 Stat. 208 (38 U.S.C. 7451 note). The statutory pay schedule for VA physician assistants therefore continues to be governed by the VA's pre-1990 nurse pay schedule.

The nationwide statutory pay system for the VA's physician assistants has eight pay grades and ten steps within each grade. See 38 U.S.C. 4107(b)(1) (1988); Exec. Order No. 13,525, § 1(c), Sched. 3 & n.****, 74 Fed. Reg. 69,231, 69,235 (2009). In contrast, the separate statutory pay system for the VA's registered nurses has five pay grades, twelve steps per grade, and pay ranges that vary by locality. See 38 U.S.C. 7404(b), 7451(b), (c)(1), (3) and (d)(3); Department of Veterans Affairs, *VA Handbook 5007: Pay Administration* Pt. X, Ch. 1, §§ 2-3, at X-1 to X-2 (2002), http://www1.va.gov/vapubs/viewPublication.asp?Pub_ID=188. Congress has required that the rate of pay for registered nurses shall increase in "equal increments" with each succes-

sive step within each grade, and that the rate of pay for the top step within each grade normally be no more than 133% of that for step 1. 38 U.S.C. 7451(c)(1) and (3).

In some VA facilities, such as those within the TVHS, the locality-based pay system required by statute for a VA nurse practitioner may yield a lower salary than that under the nationwide pay system for a VA physician assistant who performs functionally similar jobs at the facility with roughly equivalent experience. See Pet. App. 12, 25. In VA facilities in other regions of the country, however, a higher locality adjustment for nurses may result in physician assistants with similar experience and job responsibilities being paid less than their nurse practitioner counterparts. See *id.* at 12 (citing Equal Pay Act lawsuit by majority-male VA physician assistants in Texas, *Alverson* v. *United States*, 88 Fed. Cl. 331 (2009)).

b. Petitioners are 35 male and female nurse practitioners who work or have worked for the TVHS. Pet. App. 6; see Compl. 1 (naming petitioners). Petitioners allege that the VA has "discriminated against [nurse practitioners]" at TVHS—both male and female—"by paying them less than" male and female physician assistants at TVHS, who tend to be "predominately male." Pet. App. 7. From 2004 to 2008, approximately 78%-80% of the nurse practitioners at TVHS were female whereas 40%-44% of the physician assistants were female. *Ibid.* Petitioners claim that the differences in nurse and physician-assistant pay at TVHS constituted unlawful wage discrimination on the basis of sex in light of the gender ratios for the majority (78%-80%) female nurse practitioners and majority (56%-60%) male physician assistants. Petitioners, however, presented no evidence that wage disparities between the nurse practitioner

locality pay scale at TVHS and the national physician assistant pay scale were based upon sex.

3. The Court of Federal Claims (CFC) entered summary judgment for the government. Pet. App. 23-43. The court reasoned that the Equal Pay Act's provisions prohibiting wage discrimination "on the basis of sex," 29 U.S.C. 206(d)(1), did not apply to petitioners' claims, which were based upon wage disparities between two groups of employees that each contained substantial numbers of both men and women. Pet. App. 40-42.

4. The court of appeals affirmed. Pet. App. 3-15. The court of appeals articulated the legal standards established by this Court in *Corning* for analyzing an Equal Pay Act claim, *id.* at 9-10 (quoting *Corning*, 417 U.S. at 195-196, 208), analyzed the circumstances addressed by *Corning*, *id.* at 11-12, and explained that "*Corning* * * * guides our decision," *id.* at 11. The court reasoned that petitioners need not present proof of discriminatory intent under the Act, but explained that they must nevertheless establish that wage "discrimination based on sex exists or at one time existed" to prove their case. *Id.* at 13. The court concluded that petitioners failed to establish a prima facie case of such discrimination because "[m]ere reliance on gender ratios of two groups [of employees] does not establish discrimination based on sex," *id.* at 14, and because petitioners presented no evidence to support the conclusion that the wage differential between the nurse practitioner pay scale at TVHS and the national pay scale for physician assistants was based upon sex. *Id.* at 12-13.

Judge Prost concurred in the result, explaining that he would affirm on the reasoning of the CFC. Pet. App. 16-22.

ARGUMENT

The judgment of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. No further review is warranted.

1. The court of appeals correctly concluded that petitioners failed to proffer sufficient evidence at summary judgment to establish a prima facie case of wage discrimination under the Equal Pay Act. Petitioners contend that the court "improperly exp[a]nded" what plaintiffs must establish by "add[ing] a new requirement * * * that the plaintiff demonstrate either a historic or current pay differential based on sex." Pet. 9-10. Petitioners are incorrect. The Equal Pay Act by its terms has always required that plaintiffs prove wage "discriminat[ion] * * * on the basis of sex," 29 U.S.C. 206(d)(1), and, to survive summary judgment, petitioners had to produce evidence sufficient to reasonably infer that the VA "discriminate[d] * * * between employees on the basis of sex" by "paying wages to employees * * * at a rate less than the rate at which [it] pays wages to employees of the opposite sex * * * for equal work," *ibid.* See *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 195 (1974).

Petitioners' evidence of wage discrimination was that a majority (78%-80%) of the nurse practitioners at TVHS were female; that there were somewhat more male (56%-60%) than female (44%-40%) physician assistants at TVHS; and that the VA pays physician assistants (both male and female) more than it pays its nurse practitioners (both male and female) working in similar positions at the TVHS. Pet. App. 7, 19. The court of appeals correctly concluded that such evidence, standing alone, is inadequate to establish a prima facie case, *i.e.*, that "an employer pays different wages to employees of

opposite sexes." *Corning*, 417 U.S. at 195. The "[m]ere reliance on gender ratios" in a case where the male *and* female nurse-practitioner petitioners claim sex discrimination "fail[s] to raise a genuine issue of material fact that the pay differential between [nurse practitioners] and [physician assistants] is based on sex." Pet. App. 14-15; cf. *id.* at 19 (Prost, J, concurring) (concluding that petitioners failed to prove prima facie case of discrimination based on sex "given the significant participation of each gender in both classes, and given that the [petitioners] failed to allege that the significant participation was some attempt to escape liability under the [Equal Pay Act]").

There is no dispute that the VA's nurse practitioner locality pay scale applies equally to male and female nurse practitioners and that the VA's national physician assistant pay scale likewise applies equally to male and female physician assistants. Pet. App. 12-13. Congress specifically required by statute that the VA's registered nurses and physician assistants be paid under different statutory pay systems. And petitioners produced no evidence that regional fluctuations in pay between the two gender neutral pay scales were themselves sex-based. Cf. *City of L.A. Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 710 n.20 (1978) ("Even a completely neutral practice will inevitably have *some* disproportionate impact on one group or another."). A wage "differential is 'based on' the factor of sex only if the factor of sex was a cause-in-fact of the differential," *Peters* v. *City of Shreveport*, 818 F.2d 1148, 1161 (5th Cir. 1987), cert. denied, 485 U.S. 930 (1988), abrogated on other grounds, *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 238 n.2 (1989) (Title VII grounds), and, here, petitioners pre-

sented nothing that might establish such a wage difference based on sex.

In *Corning*, the Court analyzed two distinct periods of Corning's employment practices and concluded that evidence from the first period (from 1964 to June 1966) established a prima facie case because it showed that Corning had "pa[id] different wages to employees of opposite sexes 'for equal work.'" *Corning*, 417 U.S. at 195; see *id.* at 195-205 (Part II of opinion). The evidence demonstrated that, from 1964 to 1966, Corning paid its night-shift inspectors, who were "all male," significantly more than its day-shift inspectors, who were "all female." *Id.* at 192-194. And because the Court found the day- and night-shift jobs constituted equal work, the Court concluded that the evidence constituted a prima facie case of wage discrimination because Corning had paid "workers of one sex more than workers of the opposite sex for equal work." *Id.* at 196, 203; cf. *id.* at 204 (emphasizing that the night-shift inspection work was "performed solely by men").[1]

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[1] After concluding that Corning violated the Equal Pay Act from 1964 to 1966, the Court answered the "distinct question[]" whether Corning's post-1966 actions had "cure[d] its violation of the Act," *Corning*, 417 U.S. at 194-195, by examining the period "after 1966 when" Corning had taken meaningful steps "to end discrimination" by allowing women to work on the higher-paid night shift, *id.* at 205. See *id.* at 205-210 (Part III of opinion). The Court emphasized that the question for that post-violation period was "not whether the company * * * treated men the same as women after 1966," but rather was whether Corning's actions had "remedied the specific violation" that it had previously committed. *Id.* at 206. The Court reasoned that the Equal Pay Act required that employers increase "[t]he lower wage rate * * * to the level of the higher" in order to redress statutory violations, and concluded that Corning therefore was obligated by statute to cure its 1964-1966 violation of the Act by "equalizing the base wages of female day

Here, no such showing has been made. The petitioners—both male and female—allege that they were victims of wage discrimination on the basis of sex. Accordingly, the premise for the Equal Pay Act claim advanced by those nurse-practitioner petitioners who are male is that the VA paid female physician assistants with comparable experience at a higher rate for equal work. The nurse-practitioner petitioners who are female must likewise show that the VA paid male physician assistants with comparable experience at a higher rate for equal work. There is no dispute that both male and female physician assistants were paid more, but petitioners' own showing in this case merely illustrates that that differential in pay is itself *not* based on sex. It shows simply that physician assistants—both male and female—are paid more than the male and female nurse practitioners at TVHS. Unlike *Corning*, where the evidence showed an all-male group and a lower-paid all-female group, the evidence here permits no reasonable inference of a wage differential based on sex.

There is no dispute that, as petitioners have stressed and as the court of appeals has recognized, "intent is not [an] element required under the Equal Pay Act." Pet. 9; see Pet. App. 13; accord *Beck-Wilson* v. *Principi*, 441 F.3d 353, 360 (6th Cir. 2006); *Peters*, 818 F.2d at 1153.

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inspectors with the higher rates paid the night inspectors." *Id.* at 206-207 (citation omitted). "To permit the company to escape that obligation" simply by agreeing in 1966 "to allow some women to work on the night shift at a higher rate of pay," the Court explained, "would frustrate, not serve, Congress' ends," *id.* at 208, by "perpetuat[ing] the effects of the company's prior illegal practice of paying women less than men for equal work." *Id.* at 209-210. In this case, where petitioners failed to establish any violation of the Act, the question of a statutory cure for past violations is not presented.

But the absence of an intent requirement does not eliminate a plaintiff's obligation to "show that an employer pays *different wages to employees of opposite sexes* 'for equal work.'" *Corning*, 417 U.S. at 195 (emphasis added). Petitioners failed to meet that obligation here.

2. a. The decision of the court of appeals does not conflict with any decision of any other court of appeals. Petitioners cite to decisions indicating that an Equal Pay Act plaintiff need not establish either "complete" or "near-perfect diversity" in sex between groups of employees whose wages are being compared. Pet. 10-11 (quoting *Beck-Wilson*, 441 F.3d at 362, and *Peters*, 818 F.2d at 1153). But petitioners' assertion of a conflict incorrectly presumes that the court of appeals in this case held that a Equal Pay Act claim cannot be established in the absence of such complete (or near-complete) gender diversity. The court of appeals did not impose such a requirement. See Pet. App. 14 ("the ratios of males to females are irrelevant"); see also *id.* at 17, 19-20 (Prost, J, concurring) (recognizing that "[m]ixed-gender groups will be, in some circumstances, capable of alleging violations of the [Equal Pay Act]").

Moreover, nothing in *Beck-Wilson* or *Peters* reflects a division of authority on the questioned presented. In *Beck-Wilson*, the court emphasized that the VA facility in that case had created a special, higher pay scale for their physician assistants in 1990 to address a retention and recruitment problem, but, long after the problem abated, the facility retained the higher pay for physician assistants by "continu[ing] to certify to the VA" that the special pay "remain[ed] necessary" when it was not. 441 F.3d at 357-358. The facility's nurse practitioners were also 95% female whereas its physician assistants were 85% male. *Id.* at 362. In that context, the court of ap-

peals concluded that summary judgment was inappropriate. Among other things, the court reasoned that "complete gender diversity" was not necessary to establish an Equal Pay Act violation in the case and concluded that "[t]he fact that a small minority" of the facility's higher-paid physician assistants were female and a "small minority" of its lower-paid nurse practitioners were male was "not fatal to [the] plaintiffs' [Equal Pay Act] claim." *Ibid.* *Beck-Wilson* did not consider, much less hold, that a prima facie case could be established solely by comparing the wages of groups that are markedly more gender mixed. And it does not otherwise speak to the situation here, where a group of male and female nurse practitioners allege wage discrimination based *solely* on the pay to physician assistants under a nationwide pay system and where the physician assistants at a facility approach gender parity (56%-60% male, 44%-40% female) and the nurse practitioners include more than a "small minority" of men (20%-22%).

In *Peters*, the City of Shreveport argued that the plaintiffs had failed to prove a "prima facie case of sex discrimination" because lower-paid police communication officers had "historically been * * * men as well as women." 818 F.2d at 1152. The Fifth Circuit agreed with the City that at "a certain indefinable point" gender integration in a position will show that "any wage differential is clearly" not one based on sex, *id.* at 1164, and the court did not dispute that that point could be reached where 25% of the lower-paid employee group were men. See *id.* at 1164-1165. The court then concluded that, although 25% of the lower-paid officers had been men, the district court did not clearly err in finding discrimination on the basis of sex because half of the men in that group were physically disabled and "in the

same position as women in the local job market" while the other half of the men merely worked at the job on a "temporary basis" while waiting for a higher-paid City position or to supplement a pension. *Ibid.* Nothing in *Peters* suggests that the gender ratio in this case—20%-22% men in the lower-paid group and 40%-44% women in the higher-paid group—can, standing alone, establish that a differential in pay is "based on sex."

b. Petitioners assert a division of authority based on *Aldrich* v. *Randolph Central School District*, 963 F.2d 520 (2d Cir.), cert. denied, 506 U.S. 965 (1992), and *Usery* v. *Allegheny County Institution District*, 544 F.2d 148 (3d Cir. 1976), cert. denied, 430 U.S. 946 (1977), citing those decisions for the claim that a state's civil-service system or regulatory regime cannot excuse a wage differential based on sex. See Pet. 11. That assertion is meritless. Neither case confronted a question similar to that here, and neither addressed the requirements of a prima facie case. Indeed, both *Aldrich* and *Usery* (like *Corning*) confronted claims that an all-female group was paid less than an all-male group of employees who did substantially the same work. See *Aldrich*, 963 F.2d at 522 (female school "cleaner" paid less than all male school "custodians"); *Usery*, 544 F.2d at 151 (hospital's all-female "beauticians" paid less than hospital's all-male "barbers"). In those contexts, which involved no gender diversity within the higher- and lower-paid employee groups, the courts resolved the questions presented in ways that are wholly irrelevant to this case. See *Aldrich*, 963 F.2d at 524-527 (holding that (1) trial was warranted to resolve whether a cleaner and custodians performed the "same work" and (2) a state's civil service examination and classification system qualifies as a factor other than sex justifying a wage

differential only when it advances a "bona fide business-related reason" in the relevant job context); *Usery*, 544 F.2d at 152-154 (holding that (1) work of beauticians and barbers were substantially equal and (2) a state's "separate[ ] licens[ing]" regimes for the two vocations is not "controlling").

3. This Court's review is unwarranted for the additional reason that the wage differential between the VA's nurse practitioners and physician assistants is lawful because it is required by federal statute and is thus "based on [a] factor other than sex," 29 U.S.C. 206(d)(1). See *Schiro* v. *Farley*, 510 U.S. 222, 228-229 (1994) (a respondent may "rely on any legal argument in support of the judgment below"); accord *Bennett* v. *Spear*, 520 U.S. 154, 166-167 (1997).

Congress's 1990 decision to abandon a unitary, national pay system for the VA's registered nurses and physician assistants and to establish different statutory pay programs for these two professions necessarily requires that the professions be paid differently. See pp. 4-6, *supra* (explaining systems). It is mathematically impossible to consistently pay nurses and physician assistants the same amount under the two separate statutory pay systems. The pay at each of the 60 nurse grade and step combinations, for instance, cannot be mapped to matching positions on the physician assistant pay scale, which has 80 grade and step combinations. Moreover, the fact that Congress has imposed a national physician-assistant pay scale and required nurse pay to vary by locality reflects Congress's intent that nurses and physician assistants be paid different amounts.[2] The

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[2] Congress has authorized the payment of locality pay to physician assistants, but the amount of such pay is set nationally by executive

only way to create pay equity for the nurses and physician assistants would be for Congress to re-enact a single pay system for both. Complying with the separate statutory pay systems mandated by Congress in 1990 thus cannot violate the Equal Pay Act of 1963.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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order for large geographic areas that are entirely different from the local labor-market areas governing VA nurse pay under 38 U.S.C. 7451. See 5 U.S.C. 5302(1)(C), 5304 (2006 & Supp. II 2008); Exec. Order No. 13,525, § 5 and Sched. 9 & n.1, 74 Fed. Reg. at 69,231, 69,242; 5 C.F.R. 531.603; see also 38 U.S.C. 7451(d)(2) and (3) (nurse pay locality adjustment).